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No. 04-1236

Supreme Court, U.S.
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In The

Supreme Court of the United States

TONY GOODMAN,

Petitioner

v.

STATE OF GEORGIA, *et al.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The need for this Court to resolve the clear conflict in the circuits has become even more compelling since the time the petitions for *certiorari* were filed in this case. The Third Circuit has now sided with the Eleventh Circuit against the Ninth Circuit. In *Cochran v. Pinchak*, 401 F.3d 184 (3d Cir. 2005), the Third Circuit held that Congress does not have the power to abrogate state sovereign immunity pursuant to Section 5 of the Fourteenth Amendment for suits brought under Title II of the Americans with Disabilities Act (ADA) by prisoners with disabilities against a state prison.

Respondents acknowledge that "there is a conflict between decisions of the Ninth Circuit and the Third and Eleventh Circuits" on the question presented. Br. in Opp. 6. They contend only that the conflict is not "ripe." But the conflict is significant and it is not going to disappear. Two circuits have now taken the position that the application of Title II of the ADA to cases brought by prisoners against state prisons exceeds Congress's Section 5 authority, while the Ninth Circuit stands firm in its position that Congress's power to abrogate under Section 5 extends to such applications. Unless this Court steps in to resolve it, the conflict will persist. Waiting for yet more circuits to weigh in on the question would serve no useful purpose. And contrary to respondents' contentions, this case presents an especially appropriate vehicle for resolving that important question.

A. This Case Presents A Direct And Widening Conflict In The Circuits

1. At the time the petitions for a writ of *certiorari* were filed by petitioner Goodman and the United States, a direct conflict existed in the circuits regarding the question presented. In *Phiffer v. Columbia River Correctional*

Institute, 384 F.3d 791 (9th Cir. 2004), *pet. for cert. filed*, No. 04-947 (Jan. 11, 2005), a case in which a prisoner challenged the State's refusal to accommodate his disability, the Ninth Circuit had held that Title II validly abrogated state sovereign immunity. By contrast, in this case and in *Miller v. King*, 384 F.3d 1248 (11th Cir. 2004), the Eleventh Circuit had held that Title II is *not* proper Section 5 legislation as applied to cases brought against a state prison. Both the Ninth and Eleventh Circuits ruled after this Court addressed the application of Section 5 abrogation analysis to Title II in *Tennessee v. Lane*, 124 S. Ct. 1978 (2004). And as respondents acknowledge, the Eleventh Circuit's position "contrasts sharply" with the Ninth Circuit's decision in *Phiffer*. Br. in Opp. 14.

The conflict has now widened. In *Cochran v. Pinchak*, 401 F.3d 184 (3d Cir. 2005), the Third Circuit agreed with the Eleventh Circuit's ruling and held that Title II, as applied to a suit brought by a blind prisoner, "does not validly abrogate the States' sovereign immunity and cannot be enforced against the State of New Jersey or the [Department of Corrections] in a lawsuit for monetary damages." *Id.* at 193. Chief Judge Scirica dissented from that ruling. *See id.* at 193-199.

2. Although respondents acknowledge the existence of the conflict in the circuits, they contend (Br. in Opp. 4-5, 6-8) that the issue is not "ripe" for review. But there is no reason to believe that the existing conflict will resolve itself. The Eleventh Circuit denied rehearing *en banc* in this case. Pet. App. 29a-30a. The Ninth Circuit likewise has made clear that it "decline[s] further review of [its] settled precedent" on this question. *Phiffer*, 384 F.3d at 793; *see also Hason v. Medical Bd. of Cal.*, 294 F.3d 1166, 1167 (9th Cir.) (O'Scannlain, J., dissenting from denial of rehearing *en banc*), *cert. granted*, 537 U.S. 1028 (2002), *cert. dismissed*, 538 U.S. 958 (2003).

Nor is there any reason to believe that further percolation will sharpen or clarify the issue presented. Indeed, each new case further underscores the disagreement in the circuits – not just on the basic issue of whether Title II validly abrogates state sovereign immunity in the prison context but also on the broader question of the proper level of generality for applying the "congruence and proportionality" test of *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

This conflict on the broader level-of-generality question was described in the petition for certiorari (Pet. 11-14), and respondents entirely failed to address it. The Eleventh Circuit applies a "context by context" approach in determining whether Title II validly abrogates sovereign immunity in particular circumstances. *Miller*, 384 F.3d at 1276 n.34; Pet. App. 19a. As a result, that court will not sustain Title II's abrogation of sovereign immunity as applied to any case involving prisons unless it can do so for every case involving prisons. The Eleventh Circuit recently followed the same "context by context" approach in *Association for Disabled Americans, Inc. v. Florida International University*, ___ F.3d ___, 2005 WL 768129 (11th Cir. Apr. 6, 2005). As noted in the petition (Pet. 11-14, 17-19), that approach by the Eleventh Circuit conflicts with a line of pre-*Lane* circuit court precedent and with *Lane* itself by holding that Title II cannot abrogate state sovereign immunity even in a case like this one, in which Title II would provide a remedy for an actual violation of the plaintiff's constitutional rights.

The Third Circuit's recent decision in *Cochran* appears to take matters to the opposite extreme. Where the Eleventh Circuit held that a prisoner cannot seek money

damages under Title II *even when* the State's actions violated his constitutional rights, the Third Circuit appeared to hold that a plaintiff cannot seek money damages under Title II *unless* the State's actions violated his constitutional rights. The *Cochran* court looked at each of the plaintiff's requested accommodations and concluded that their denial did "not rise to the level of a violation" of the Fourteenth Amendment. 401 F.3d at 192. Noting that "these cases are always fact-specific," *id.* at 193, the court concluded that "Title II's remedies are not congruent and proportional to the specific claims brought here." *Id.* at 191.

The Third Circuit's claim-specific mode of analysis stands in opposition to the Eleventh Circuit's "context by context" approach. *Miller*, 384 F.3d at 1276 n.34. And both approaches contrast with the Ninth Circuit's decision to "uph[o]ld the entirety of Title II." *Phiffer*, 384 F.3d at 793 (O'Scannlain, J., concurring). The widening disagreement among the circuits – on both the basic question whether Title II validly abrogates state sovereign immunity in the prison context and the broader question of the level of generality at which the *City of Boerne* "congruence and proportionality" analysis should be conducted – calls out for this Court's resolution.

B. This Case Is An Especially Appropriate Vehicle For Resolving The Conflict In The Circuits

1. This case is an especially appropriate vehicle for resolving the conflict in the circuits. The parties developed an extensive factual record, and the opinion of the court of appeals contains a substantial discussion of the constitutional violations implicated by the facts. Thus, this case comes to the Court in a posture that will permit informed

consideration of the as-applied approach to Section 5 analysis adopted in *Lane*. *See* Pet. 19-21.[1]

Respondents nonetheless assert (Br. in Opp. 15) that *Phiffer* presents a better vehicle for this Court's review. But in contrast to this case – which was resolved on a motion for summary judgment after the submission of affidavits and documentary evidence, Pet. App. 11a – *Phiffer* has received virtually no factual development. And as the United States pointed out in its petition for *certiorari* in the instant case, the Court would likely be unable to reach this constitutional question in *Phiffer*; Phiffer's claim under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, would afford him precisely the same relief as is available under Title II of the ADA. *See* Pet. for Cert., *United States v. Georgia*, No. 04-1203, at 17-19.

2. Respondents note (4-5, 8-11) that the Eleventh Circuit's opinion was unpublished and relied on the court's earlier *Miller* decision to resolve the Title II

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[1] Respondents attempt to cast doubt on petitioner's complaint by referring to the events underlying his criminal conviction—events that took place in 1995. Br. in Opp. 3 n.2. But petitioner's allegations are supported by prison medical records and sworn affidavits. *See* Pet. App. 11a; Dt. Ct. Dkt. 37 at 9 (magistrate judge recommending denial of respondents' motion for summary judgment because "a genuine issue of material fact" exists concerning petitioner's claim "that he was injured when he fell while transferring himself from his wheelchair to the toilet and when he was trying to move from his wheelchair to a seat in the shower stall"); Dt. Ct. Dkt. 31 at 2 (Respondents' Motion for Summary Judgment) (explaining that petitioner was assigned to his housing unit because of "the special requirements associated with him being wheel chair bound"). Even the opinion cited by respondents states that, viewing the evidence at the criminal trial in the light most favorable to the government, petitioner "needed help getting out of" his car and required someone else to open a door "so that [he] could wheel himself" into his house. *Goodman v. State*, 516 S.E.2d 824, 825 (Ga. App. 1999).

sovereign immunity question. But this Court has granted *certiorari* in numerous cases just like this one – where a court of appeals, in an unpublished opinion, relied on prior published circuit precedent that conflicted with rulings of other circuits. *See, e.g., Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 602 (2001); *Carter v. United States*, 530 U.S. 255, 260 (2000); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 520-521 (1999); *Old Chief v. United States*, 519 U.S. 172, 177-178 (1997); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 20 (1993).[2] Indeed, in *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), this Court granted *certiorari* in the case of an unpublished opinion "[b]ecause the court below declared a federal statute unconstitutional" under circumstances much like this case. *Id.* at 425. The court of appeals in *Edge* had "affirmed a judgment that an Act of Congress was unconstitutional as applied" using "reasoning that was questionable" under this Court's cases. *Id.* at 425 & n.3.

Respondents also observe (Br. in Opp. 8, 9 n.4) that a petition for rehearing *en banc* remains pending in *Miller*.

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[2] The Court also regularly grants *certiorari* in cases of unpublished decisions to resolve circuit conflicts without even noting the presence of any published precedent in that circuit. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 430-431 (2001) (*certiorari* granted "to resolve confusion among the Courts of Appeals" in case where court of appeals' opinion was unpublished); *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 61 (2000) (*certiorari* granted "in light of disagreement among the Circuits" in case where court of appeals' opinion was unpublished); *Lynce v. Mathis*, 519 U.S. 433, 436 (1997) (*certiorari* granted to review court of appeals' unpublished order denying a certificate of probable cause where another circuit "reached a different conclusion on similar facts").

That fact is of much less significance here than it might be elsewhere, because the same three-judge panel of the Eleventh Circuit heard oral argument on the same day in both this case and in *Miller*. That panel issued its unpublished opinion in this case just two days after it issued its published opinion in *Miller*. Therefore, the denial of the petition for rehearing *en banc* in this case – at a time when the rehearing petition in *Miller* was pending – suggests that the court's resolution of the *Miller* petition will not affect the issues presented here and that any possible change to the disposition of *Miller* will relate to an issue that is not common to both cases. Indeed, the Eleventh Circuit continues to treat *Miller* as setting forth the law governing abrogation of state sovereign immunity under Title II. *See Association for Disabled Americans, Inc.*, ___ F.3d at ___, 2005 WL 768129, at *3 (relying on *Miller* to decide the validity of Title II's abrogation "as applied to access to public education").

In any event, even if the Eleventh Circuit were to grant rehearing in *Miller* and reverse its Section 5 holding, that would neither eliminate the circuit split (which would merely shift to two-to-one in the other direction) nor provide petitioner any relief (because the petition for rehearing *en banc* in his case has already been denied, Pet. App. 29a-30a). Unless this Court steps in to resolve the conflict in the circuits, that disagreement will persist and petitioner will be denied the full panoply of remedies Congress intended to confer upon him and other victims of discrimination.

3. Respondents also contend (Br. in Opp. 8, 10) that review is not warranted because the court of appeals gave petitioner "what he sought," by permitting him to proceed on his damages claim brought under 42 U.S.C. § 1983 for violation of his Eighth Amendment rights. But there are profound differences between the relief available to

petitioner under Section 1983 and the relief he seeks under Title II of the ADA. Petitioner can recover damages under Section 1983 only from the individual defendants, who may very well be judgment-proof. He cannot recover damages from the State, as he seeks to do in his Title II claim. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64-71 (1989); Pet. App. 15a. And because his Section 1983 claims can proceed against only the individual defendants in their personal capacities, those claims will be subject to a qualified immunity defense. *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987). No such defense would apply to his Title II suit seeking damages from the State itself. *Cf. Owen v. City of Independence*, 445 U.S. 622, 652-656 (1980).

Respondents further assert (Br. in Opp. 10) that petitioner can continue to litigate his claims for prospective injunctive relief under Title II. But the court of appeals' holding regarding Congress's authority under the Fourteenth Amendment is not limited to actions for damages; it implicates actions for injunctive relief as well. Pet. App. 21a (dismissing ADA claim for injunctive relief against respondents Georgia and its agencies). If the Eleventh Circuit's Section 5 holding stands, the statute will provide no basis for *any* relief against a State in the prison context – damages *or* an injunction – unless it can be upheld under Congress's Article I commerce power in that context.

Significantly, respondents devoted more than six pages of their summary judgment brief in the district court to the contention that "the Commerce Clause does not authorize Congress to regulate state correctional facilities under the Americans with Disabilities Act." Dt. Ct. Dkt. 31 at 7 (capitalization altered). The district court did not rule on the Commerce Clause argument, and the Eleventh Circuit has made clear that the question remains

open. *See Miller*, 384 F.3d at 1268 n.23. Not having abandoned their contention that Title II exceeds Congress's Commerce Clause authority as applied to the prison context, respondents cannot credibly represent that Goodman – or any other prisoner in the Eleventh Circuit – will be entitled to injunctive relief should he prove a violation of his rights under that statute.

C. The Eleventh Circuit's Ruling Was In Error

Respondents make no sustained effort to defend the Eleventh Circuit's conclusion that Congress lacks Section 5 power to abrogate state sovereign immunity in Title II suits against state prisons. They assert only that the court of appeals "gave proper deference" to the "analytical roadmap" prescribed by this Court in *Lane*. Br. in Opp. 13. But as the petitions for *certiorari* filed by Goodman and the United States demonstrate, the Eleventh Circuit's ruling contravenes the holdings in *Lane* in two respects.

First, the court of appeals failed to appreciate that the prison context – like the access to courts context in *Lane* – implicates constitutional rights that impose "affirmative obligations" on the State, *Lane*, 124 S. Ct. at 1994, and otherwise demand "more searching judicial review," *id.* at 1988. *Compare* Pet. 14-17 (detailing affirmative obligations imposed by Eighth Amendment and other constitutional provisions), *with Miller*, 384 F.3d at 1274 (concluding that Eighth Amendment imposes only a "negative obligation" in the prison context). Relatedly, the Eleventh Circuit failed to give sufficient weight to the "substantial body of evidence of states' unconstitutional treatment of disabled prisoners" which "has persisted despite several legislative efforts to remedy the problem of disability discrimination." *Cochran*, 401 F.3d at 198 (Scirica, C.J., dissenting).

Second, the court erroneously held that Title II of the ADA could not validly abrogate state sovereign immunity in any prison case, even one in which the statute provides a remedy for an actual violation of the plaintiff's constitutional rights. *See* Pet. 17-19. Respondents make no effort to answer this point, but simply contend that the Eleventh Circuit in *Miller* engaged in an as-applied analysis while the Ninth Circuit in *Phiffer* did not. Br. in Opp. 11-15. That contention, of course, only underscores the conflict in the circuits that calls out for this Court's resolution.

CONCLUSION

For the reasons set forth above and in the petition for a writ of *certiorari*, and in the petition in *United States v. Georgia*, No. 04-1203, the petition should be granted.

Respectfully submitted,

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